LEE NYUK HENG & ANOR

v.

PEMBANGUNAN LADANG HASSAN SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
IAN HC CHIN J
[SUIT NO: S22-04-2002]
14 NOVEMBER 2002

COMPANY LAW: *Meetings - Annual General Meeting - Whether notice thereof valid - Single member attending - Appointment of corporate representative - Whether adequate quorum - Effect on resolution passed at such meeting - Companies Act 1965 ss. 147(3), 150, 355(2)*

On 30 October 2001, the company secretary gave a notice of an annual general meeting ('AGM'). However, the AGM was adjourned to 30 November 2001 due to lack of quorum. The 5th defendant then appointed the 6th defendant as a corporate proxy for the 3rd defendant to enable the 6th defendant to attend and vote at the AGM on 30 November 2001. During the AGM, it was resolved, *inter alia* that the 2nd plaintiff would not be re-elected as a director. Thereafter, a board of directors' meeting was held on 6 December 2001, where it was resolved, among others, that the 1st plaintiff be removed as the managing director. The plaintiffs brought an action contending that the following acts were irregular, namely: (i) the purported authority of the 5th defendant to appoint the 6th defendant as corporate representative of the 3rd defendant company; (ii) the purported appointment of the 6th defendant as corporate representative of the 3rd defendant company; (iii) the purported quorum at the board of directors' meeting on 6 December 2001; (iv) the removal of the 2nd plaintiff as a director at the purported AGM; and (v) the validity of the resolutions passed at the board of directors' meeting and AGM.

Held (granting the injunction; order in terms):

[1] Following *Re Salvage Engineers Ltd*, notwithstanding the two corporate representative instruments, the 5th defendant alone could not constitute a quorum. Therefore, the purported AGM was inquorate and a nullity with the result that all resolutions passed thereat were invalid. (p 244 f-h)

[2] The notice of the meeting was invalid as it was not sufficient to enable the matter of the appointment of a chairman to be the matter of a resolution as the matter merely spoke of the fixing of a date for the holding of the

AGM. Furthermore, since the fixing of a date of meeting deserved a specific reference, the matter of the proposal to appoint the chairman also deserved a specific mention. (p 248 h)

[3] The appointment of the 5th defendant as chairman and the removal of the 1st plaintiff as managing director were invalid as they were acts that flowed from an invalid notice of meeting. (p 249 b)

[4] The transfer of the share was invalid as it was not approved by a duly constituted board of directors and therefore in contravention of art. 36A and (2). Therefore, the AGM was inquorate as the 6th defendant was not at the relevant time a shareholder because of the invalid transfer of share. As a result, everything that flowed from that AGM was also invalid and that includes the non-re-election of the plaintiffs as directors. (p 251 b-c)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Case [1995] 3 CLJ 639 CA ***(foll)***
American Cyanamid v. Ethicon Ltd [1975] AC 396 ***(refd)***
Chan Choon Ming v. Low Poh Choon & Ors [1995] 1 CLJ 812 HC ***(dist)***
Dr Mahesan & Ors v. Ponnusamy & Ors [1994] 3 MLJ 312 ***(refd)***
Hunter v. Hunter [1936] AC 222 ***(foll)***
Khoo Choon Yam v. Gan Miew Chee [2000] 2 CLJ 788 HC ***(dist)***
La Companie Mayville v. Whitley [1896] 1 Ch D 788 ***(refd)***
R v. Cogdon [1877] VR 88 ***(refd)***
R v. Leech [1879 5 VR 494 ***(refd)***
Re Al Sombrero [1958] 1 Ch D 900 ***(refd)***
Re Fraser & Neave Ltd Tan Keng Siong v. Tan Hock Kiang & Ors [1967] 2 MLJ 282 ***(foll)***
Re Opera Photographic [1989] BCLC 763 ***(refd)***
Re Portuguese Consolidated Copper Mines 42 Ch D 160 ***(foll)***
Re Salvage Engineers Ltd [1962] 28 MLJ 438 ***(foll)***
Sing Eng (Pte) Ltd v. PIC Property Ltd [1990] 3 MLJ 129 ***(foll)***
Solaiappan & Ors v. Lim Yoke Fan & Ors [1968] 2 MLJ 21 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 147(3), 150, 174(3), 355(2)

For the plaintiffs - Norbert Yapp; M/s Jayasuriya Kah & Co
For 5th & 6th defendants - Lim Hock Leng (Priscilla Lim); M/s Lim Guan Sing & Co

Reported by Izzaty Izzuddin

JUDGMENT

Ian HC Chin J:

This is an application for an injunction by the plaintiffs Lee Nyuk Heng and Lee Nyet Vui against various defendants two of whom are their brothers, namely Lee Ah Soo @ Francis Lee Nyet Khiong (the 5th defendant) and Lee Nyuk Kheng (the 6th defendant) following the taking out of an action against them. They are all left a fortune by their late father Datuk Lee Kang Yu some of it in the form of the three companies, Pembangunan Ladang Hassan Sdn Bhd, Syarikat Warga Jaya Sdn Bhd, and Syarikat Saliha Sdn Bhd, which are named as the 1st defendant to the 3rd defendant. The siblings have direct equal shareholdings in the second and third company while the first company is owned by the corporate shareholdings of the second and third company. These companies had all been regarded as the family companies. There is yet another company, which is the 4th defendant which the plaintiffs claim is also part of the family group of companies and with the same equal shareholding but this is disputed because the shareholding was at a certain time changed with the 5th defendant owning 4,999,999 shares while one share was owned by the 1st plaintiff. There is dispute as to how and for what purpose the change was made but the plaintiffs' case is that the transfer of the shares was for the purpose of creating a trust while the 5th defendant says otherwise. Suffice to say that it is arguable that the 4th defendant company could be part of the family group of companies since a lot of its income had been used for the purposes of the other companies in the group. All the siblings were at all relevant times directors of the four companies with the 1st plaintiff as the managing director while all the siblings are corporate representatives pursuant to s. 147(3) of the Companies Act, 1965 of the companies that owned shares in the 1st defendant. The plaintiffs had been managing the four companies until various resolutions were passed which resolutions and their effects are being challenged by the plaintiffs. As for the business of these four companies, the following undisputed summary made by Mr Norbert Yapp, learned counsel for plaintiffs, is reproduced here:

> The 1st defendant company is principally involved in the planting and production of oil palm (known as "Ladang Hassan Estate") with an acreage of approximately 6,000 acres situated in Sandakan, Sabah; whereas the 2nd and 3rd defendants are involved in timber related activities with their operations centred mainly in Tawau, Sabah. The 4th defendant company (an offshoot from Bumigaya Sdn Bhd) is a timber concessionaire, currently holding a Forest Management Unit (FMU) licence issued by the State Government of Sabah. It has been managed by the 1st plaintiff as its managing director for many years. The 2nd and 3rd defendant companies have been acting as its extraction contractors even way back in 1981. ...

a In so far as the 5th and 6th defendants are concerned, again it is not in dispute, they were not active in the affairs of the four companies. Everything was tranquil until the storm broke in November and December 2001 when the 5th and 6th defendant wrested the control of the companies from them. The events that took place during the two months are these.

b Firstly with the events concerning the 1st defendant, where on 30 October 2001 the secretary gave notice of an annual general meeting (AGM). The notice is reproduced here:

"LNV-5"

c PEMBANGUNAN LADANG HASSAN SDN BHD
(020200-A)
(Incorporated in Malaysia)

NOTICE OF ANNUAL GENERAL MEETING

d NOTICE IS HEREBY GIVEN THAT the 2001 Annual General Meeting of the Company will be held at the Conference Room, Damai Plaza III, 3rd Floor, C11 North Wing, Jalan Damai, Kota Kinabalu on 23 November 2001 at 2.00 p.m, for the following purpose:

1. To receive and consider the accounts for the year ended 28th February
e 2001 and reports of the Directors and Auditors thereon.

2. To elect Directors

3. To appoint Messrs HORWATH TH LIEW TONG, formely known as T.H. Liew Tong & Gabungan as auditors of the Company and to authorise the
f directors to fix their remuneration.

A member entitled to attend and vote at the meeting is entitled to appoint a proxy to attend and vote in his stead. A proxy need not be a matter of the Company.

g BY ORDER OF THE BOARD

(NG NYUK KEONG)
SECRETARY

Sandakan

h Dated: 3-10-2001

NOTE: The instrument appointing a proxy must be deposited at the Registered Office of the Company not less than 48 hours before the time for holding the meeting or any adjournment thereof.

i

The AGM was adjourned to 30 November 2001 due to the lack of a quorum as the plaintiffs chose to stay away. In the meantime the 5th defendant appointed the 6th defendant as a corporate proxy for the 3rd defendant which enabled the 6th defendant to attend and vote at the AGM held on 30 November 2001 at which meeting it was resolved, among others, that the 2nd plaintiff be not re-elected. The document appointing the 6th defendant as proxy for the 3rd defendant is reproduced here:

"LNV-9"

PEMBANGUNAN LADANG HASSAN SDN BHD
(020200-A)
(Incorporated in Malaysia)

Form of Proxy

We, SYARIKAT WARGA JAYA SDN BHD (12501-B) being a member of the abovenamed Company, hereby appoint Mr Lee Nyuk Kheng (IC No. 661124-12-5349) of Mile 2 1/2, North Road, PO Box 1433, 90715 Sandakan as our proxy to vote for us and on our behalf at the Adjourned 2001 Annual General Meeting of the Company to be held on 30th November 2001 at 2.00 p.m. and at only adjournment thereof.

As witness my hand this 27 day of November 2001

...
(FRANCIS LEE NYET KHIONG (550222-12-5471)
DIRECTOR
For and on behalf of Syarikat Warga Jaya Sdn Bhd (12501-V) and pursuant to Certificate of Appointment of Representative By A Corporation dated 4th December 1989 by Syarikat Warga Jaya Sdn Bhd (12501-V)

Note:

A member of the Company entitled to attend and note at the Meeting may appoint a proxy to attend and vote instead of him. A proxy need not be a member of the company. The instrument appointing a proxy must be deposit at the Registered Office of the Company not less than 48 hours before the time appointed for holding the meeting.

A board of directors meeting then took place on 6 December 2001 and the 2nd plaintiff who attended the meeting was recorded as being in attendance only since he was already removed as a director during the AGM. It was resolved during the meeting that the 1st plaintiff be removed as managing

director. The plaintiffs' authority to operate the bank accounts and to sign cheques were also revoked and it was instead conferred on the 5th and 6th defendants. By now the coup was completed and the plaintiffs being effectively removed from control of the company.

The plaintiffs contend that the following acts are irregular, viz:

(a) The purported authority of the 5th Defendant to appoint the 6th Defendant as the corporate representative of 3rd Defendant company;

(b) The purported appointment of 6th Defendant as corporate representative of the 3rd Defendant company;

(c) The purported quorum at the board of directors' meeting on 6 December 2001; and

(d) The removal of 2nd Plaintiff as a director at purported AGM;

(e) The validity of the resolutions passed at the board of directors' meeting and AGM.

When considering those contentions, it has to be recalled that the 1st defendant has as its shareholders the two companies, that is, the 2nd defendant and 3rd defendant. In order for the two companies to attend the meeting of the 1st defendant and vote thereat, it has to and did appoint their representatives. They did so by the following instruments:

CERTIFICATE OF APPOINTMENT OF REPRESENTATIVE BY A CORPORATION

This is to certify that by a resolution of directors of Syarikat Saliha Sdn Bhd duly held on 1 October 1996 Lee Ah Soo @ Francis Lee Nyer Khiong, or failing him, Mr Lee Nyuk Heng has been appointed, pursuant to action 147(3) of the Companies Act, 1965, to act as the Company's Representative at any meeting of the members or creditors of other companies in which the Company is or may thereafter become interested as a member or creditors.

Dated this 15th day of October, 1996

The common seal of Syarikat Saliha Sdn Bhd

as affixed hereto in the presence of

...

(LEE NYUK HENG)
DIRECTOR

...

(LEE NYUK KHIONG)
SECRETARY

CERTIFICATE OF APPOINTMENT OF REPRESENTATIVE BY A CORPORATION

This is to certify that by resolution of directors of SYARIKAT WARGA JAYA SDN BHD duly held on the 4th day of December, 1989, Mr. Lee Nyet Khiong, or failing him, Mr Lee Nyuk Heng, or failing him, Mr. Francis Lee Nyet Khiong, to act as the Company's Representative at any meeting of the members or creditors of other companies in which the Company is or thereafter become interested as a member or creditor.

Dated this 4th day of December, 1989.

The Common Seal of SYARIKAT WARGA JAYA SDN BHD was affixed hereto in the presence of

... ...
Director Secretary

In my view it is arguable that as a result of those instruments only the 1st plaintiff or the 2nd plaintiff or the 5th defendant could be the proper representative of the 3rd defendant for the purposes of attending the meetings of the 1st defendant. It was argued by Dr Lim Hock Leng, learned counsel for the defendants, that the proxy could be appointed by an officer of the 3rd defendant by virtue of art. 74 of the articles of association of the 3rd defendant. Even assuming that it does and therefore abrogates what otherwise was a valid statutory proxy, termed representative under s. 174(3), which allowed either of the plaintiffs or the 5th defendant to act for the 3rd defendant, such a proxy still requires the appointment to be done properly, like the passing of a resolution by the board of directors of the 3rd defendant for the 6th defendant to be appointed its proxy and for the instrument appointing the proxy to be under the seal of the company, all of which are not present.

It was then contended that the 5th defendant alone could have conducted the meeting by virtue of the two corporate representative instruments, *supra*. One case relied on for this proposition of law were *R v. Cogdon* [1877] VR 88 where it is said, at p. 91:

> The affidavits filed on behalf of the applicant sufficiently show that the person present and acting at the time and place appointed for the meeting of creditors, represented and held proxies for more than one creditor. There would be nothing inconsistent in such a case, in his voting in favour of another candidate, on behalf of the other, if he were so instructed. The resolution appointing the liquidator was in this case carried. It is therefore unnecessary whether 1 creditor can constitute a meeting within the meaning of ss. 65 and 74.

Another case relied on is *R v. Leech* [1879 5 VR 494, at pp. 502-503 where it is said:

> It is true that it was held in *Sharp v. Daws*, that one shareholder cannot constitute a meeting; but this Court has already decided that 1 person holding proxies for 2 creditors, can constitute a meeting, and even vote in a different way in respect of each proxy, as his instructions may direct him: *R v. Cogdon*, *exp Hasker*. As the Act allow proxies, we must take it that 2 creditors were present at the meeting at which the appointment in question was made. This view may no doubt conflict with that expressed by Mr Justice Molesworth in *Re SchlieH*, under the *Insolvency Ad*, 5 Vict. No. 17; possible the apparent conflict may disappear upon a careful comparison of the two Acts; but, without entering on that question, I do not feel at liberty to depart from the previous decision of the Court, in *R v. Cogdon expo Hasker*. The proxy might be, at different moments, the mouthpiece of different creditors.

However, the Malaysian authority on this point differs from those cases which Malaysian case I would respectfully follow and it is the case of *Re Salvage Engineers Ltd* [1962] 28 MLJ 438 where it was held that the articles did not authorize a one-man meeting even though the only person present held a proxy from another member. Article 57 of the 1st defendant states: "Two members present shall be a quorum for all purposes." Therefore, notwithstanding the two instruments, the 5th defendant alone cannot constitute a quorum.

Consequently, it is arguable that the purported AGM held on 30 November 2001 was inquorate and a nullity with the result that all the resolutions passed thereat are invalid.

The defendants had urged the court to make an order to give validity to whatever was amiss under s. 355(2) of the Companies Act. Looking at the facts of this case and particularly to the fact that the plaintiffs had for many years been managing the four companies until the said defendants made their moves in November 2001 to wrest control of the companies by methods which

I have already adverted and which are arguably questionable, I do not think I should exercise such power. To exercise that power would mean shutting out completely the plaintiffs who together own 50% interest in if not all four companies but in at least three of them would be a great injustice to them. The sense of injustice would be felt even stronger if one takes into account the fact that the plaintiffs had been managing those companies for many years.

That it can be said that the companies have been properly managed by the plaintiffs can be justified by the absence of any complaint all these years of any impropriety on their part from any quarters. In fact the accounts have been passed year after year including the year of 2001 without any reservation. I am not unaware of the many allegations on the part of the said defendants but there are just allegations which the plaintiffs had countered. The balance of convenience tilts in favour of the plaintiff as they have been managing the companies while the said defendants stayed away out of their own choice. The Plaintiffs would be more knowledgeable and consequently more capable of running the companies beneficially for everyone.

This brings me to the second company, the 2nd defendant. The secretary issue a notice to all the directors in respect of a meeting of the board scheduled for 30 November 2001. This is what the notice looks like:

SYARIKAT SALIHA SDN BHD
(011818-D)
(Incorporate in Malaysia)

Date 26th November 2001
To the Director
Syarikat Saliha Sdn Bhd
PO Box 1433
90715 Sandakan

Dear Sirs

NOTICE IS HEREBY GIVEN that a Board of Director' Meeting will be held a the Conference Room, Damai Plaza III, 3rd Floor, C11 North Wing, Jalan Damai Kota Kinabalu on 30th November 2001 at 1.30 p.m.

Agenda

1. To fix the date of 2001 Annual General Meeting

2. Any other matters

ORDER OF THE BOARD
...
(NG NYUK KEONG)
SECRETARY

It is clear from the notice that the matter for discussion is the fixing of a date for the 2001 AGM. According to the plaintiffs, it was because of this unimportant matter of the choosing of a date for the meeting that it led them to decide not to attend the meeting that was scheduled for 30 November 2000. On the said date, apart from fixing the date of the AGM, the 5th defendant was elected as the chairman of the board of directors. A board meeting was then held on 6 December 2001 at which meeting the 5th defendant used a casting vote on the basis that he was the chairman and the motion to remove the 1st plaintiff as managing director was carried and he was replaced by the 6th defendant. This led the plaintiffs to complain that the notice of the board meeting was bad as it omitted to spell out in the agenda the proposal to appoint the 5th defendant as the chairman. The defendants contended that it is not necessary to give notice of the business to be transacted at the meeting, relying on *La Companie Mayville v. Whitley* [1896] 1 Ch D 788 at p. 797 where it is said:

> The great point is whether, when a directors' meeting is to be held, it is necessary to give notice not only of the meeting, ... but of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary.
>
> ... that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend to the transaction of the affairs of the company or corporation./I
>
> ... Being paid for their services - as they generally are, and as is the case in this company - it is their duty to go when there is any business to be done, and to attend to that business whatever it is./I
>
> I cannot now say for the first time that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had to notice of the kind of business which is to come before them. Such a rule would be extremely embarrassing in the transaction of the business of companies.

That case appears to support that proposition of law. Another case relied on is the High Court decision in *Dr Mahesan & Ors v. Ponnusamy & Ors* [1994] 3 MLJ 312, at p. 321 which followed that case and where it is said:

> Since in law, the business to be transacted at the meeting of the directors is not required to be included in the notice, it is therefore not the requirement of the law that the agenda be included in the said notice.

In answer, the plaintiffs had relied on the Federal Court case of *Solaiappan & Ors v. Lim Yoke Fan & Ors* [1968] 2 MLJ 21 but it was concerned with the notice of an AGM and not with a board of directors' meeting and I do not think it can be relied on as the present issue concerns the notice of a

board of directors' meeting. Two other cases, *Khoo Choon Yam v. Gan Miew Chee* [2000] 2 CLJ 788 and *Chan Choon Ming v. Low Poh Choon & Ors* [1995] 1 CLJ 812, relied on by the plaintiffs are also of no assistance as they are concerned with a circulated resolution and not with the agenda in a notice of meeting. However, there appears to be support for the proposition that unless the object of the meeting is set out with sufficient particularity in the agenda, the notice of the meeting may not be valid and this can be found in the following passage in the Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Cases* [1995] 3 CLJ 639, at pp. 667-668, viz:

> Whilst particular cases may be distinguished upon their special facts, I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid, unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors. *Young v. Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223 is authority for that proposition. In that case, it was held that, 'where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting, and accordingly the omission to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body' (per Abdoolcader J in *PP v. Datuk Hj Harun bin Hj Idris & Ors* [1977] 1 MLJ 180 at p 189).
>
> Although all three members of the English Court of Appeal (comprising Lord Stemdale MR, Warrington and Scrutton LJJ) delivered separate judgments, I think it sufficient if I quote from the judgment of the Master of the Rolls [1920] 2 KB 523 at pp 527-528; [1920] All ER Rep 223 at pp 226-227. This is what he said:
>
> > I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting. It seems to me that is quite clearly laid down in *Smyth v. Darley* 2 HLC 789 at p 803, where Lord Campbell says:
> >
> > > 'The election' [and you may read 'expulsion' for 'election'; exactly the same principle applies] 'being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance - as, for instance, abroad - there could not be a good electoral assembly.'

And in the same way in *Portuguese Consolidated Copper Mines* 42 Ch D 160 at p 167 Lord Esher says this:

> I will assume that every point taken by Mr Rigby and Mr Buckley ought to be decided in their favour except one. That one is this, that according to their own argument it is necessary that all the directors should have had notice of the meeting of the 24th.

That was on general principles I think, and not any special provision in the articles that notice should be sent to every member.

> If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th.

Therefore as to the general principle, I think, there can be no question. If the absent member of the body is at such a distance that it is' physically impossible for him to attend in obedience to a summons, then the convener of the meeting is excused from sending the notice to that member, and without any such notice to him the meeting of the body will be properly convened. I incline to think, but I do not express any very definite opinion, that the same exception would probably be held good where it was undoubted that a member of the body was so dangerously ill that it was impossible for him to be moved, even although he might not be at a distance; and in *Re Portuguese Consolidated Copper Mines*, it is also, I think, decided that a person who ought to be summoned cannot dispense the convener of the meeting from summoning him by saying, 'I shall not be able to come; you need not summon me.' There the director had gone to Ireland, and said he should be in Ireland. It was pointed out that Ireland is not inaccessible by post, nor is England inaccessible from Ireland if the director thought fit to come back from Ireland and attend the meeting. I do not know of any other exception.

I pause to note that the decision in *Young* does not appear to have been brought to the attention of Plowman J in *Bentley-Stevens* nor to Zakaria Yatim J in *Dr Mahesan*. It is difficult, if not impossible, to predict what the decisions in these two cases may have been if that had been done.

I would respectfully follow what the Court of Appeal had said in that case to conclude that the notice of the meeting was not sufficient to enable the matter of the appointment of a chairman to be the matter of a resolution as the matter merely speaks of the fixing of a date for the holding of the AGM. I am prepared to go as far as to say it is highly arguable that the failure to state the matter of the proposal to appoint the 5th defendant as the chairman was deliberate as the surely such matter is far more important than the fixing of a date of meeting and since the fixing of a date of meeting deserves a specific

reference, the matter of the proposal to appoint a chairman also deserves a specific mention. The fixing of a date for holding the AGM is a ruse intended to disarm the plaintiffs of their vigilance against the intention of the said defendants to appoint the 5th defendant as chairman and therefore to wrest control of the companies. The notice of meeting was therefore invalid. Consequently, the appointment of the 5th defendant as the chairman and the removal of the 1st plaintiff as managing director, which are acts that flow from such invalid notice are themselves invalid as well (see *Aik Ming's* case).

The invocation of s. 355 was also urged but for the same reasons as I have said earlier, I would also refuse to do so. The additional reason for my refusing to do so is that fact that the appointment of the 5th defendant as chairman was bulldozed through despite the objection of the plaintiffs and it was achieved through the exercise of the casting vote which power was obtained improperly.

I turn now to the matter concerning the 4th defendant company. Again the proprietary of a notice of meeting is called into question. The notice of AGM dated 30 October 2001 is in this form:

"LNV-1"

BUGAYA FORESTS SDN BHD

(083271-T)

(Incorporated in Malaysia)

NOTICE OF ANNUAL GENERAL MEETING

NOTICE IS HEREBY GIVEN THAT the 2001 Annual General Meeting of the Company will be held at the Conference Room, Damai Plaza III, 3rd Floor, C11 North Wing, Jalan Damai, Kota Kinabalu on 23 November 2001 at 2.00 p.m, for the following purpose:

ORDINARY BUSINESS

1. To receive and consider the accounts for the year ended 28th February 2001 and reports of the Directors and Auditors thereon.

2. To elect Directors

3. To appoint Messrs HORWATH T.H. LIEW TONG, formely known as T.H. Liew Tong & Gabungan as auditors of the Company and to authorise the directors to fix their remuneration.

4. To consider and, if thought fit, to pass the following resolution as Ordinary Resolution:

AUDITED ACCOUNTS - 31st MARCH 2000

"THAT the account and the Director and Auditors Report thereon for the year ended 31st March 2000 be and are hereby received and adopted"

A member entitled to attend and vote at the meeting is entitled to appoint a proxy to attend and vote in has stead. A proxy need not be a matter of the Company.

BY ORDER OF THE BOARD

...
(NG NYUK KEONG)
SECRETARY

Sandakan
Dated: 3-10-2001

NOTE: The instrument appointing a proxy must be deposited at the Registered Office of the Company not less than 48 hours before the time for holding the meeting or any adjournment thereof.

The AGM could not proceed on the scheduled date as there was a lack of quorum as the 1st plaintiff did not attend the meeting. It was adjourned to 30 November 2001. In the meantime the 5th defendant and 6th defendant purported to hold a board meeting and approved a transfer of one share from the 5th defendant to the 6th defendant. The company secretary was not aware of this meeting and the 1st plaintiff was also in the dark about it. The AGM proceeded on 30 November 2001 attended by the 5th and 6th defendants. The 6th defendant attended and voted at the AGM by virtue of the one share that was transferred to him. The 1st plaintiff was unaware of this AGM which also resolved not to re-elect the plaintiffs as directors. The plaintiffs contended that the transfer of the share is ineffectual because (1) the transfer was done without giving any notice and therefore was in breach of the pre-emption clause o f art. 36A and (2) it was not approved by a duly constituted board of directors. The defendants argued that the transfer was done to ensure that there was a quorum for the AGM which meeting is a statutory requirement and that since the plaintiffs had frustrated the meeting the court should not come to their aid. Let me deal firstly with the propositions of laws which are not really a matter of dispute. In *Re Fraser & Neave Ltd Tan Keng Siong v. Tan Hock Kiang & Ors* [1967] 2 MLJ 282 it was held that a shareholder who wishes to transfer his shares must comply with the articles governing such matter. The consequence of the failure to comply with the articles, as decided in

Hunter v. Hunter [1936] AC 222 and *Sing Eng (Pte) Ltd v. PIC Property Ltd* [1990] 3 MLJ 129, renders the transfer ineffectual and inoperative. The transfer is also invalid if it was not approved by a duly constituted board of directors and that was decided in the case of in *Re Portuguese Consolidated Copper Mines Ltd* [1889] Ch D 160. I would respectfully follow the cases I have referred to. The transfer of the share was therefore invalid as it was not approved by a duly constituted board of directors and therefore in contravention of the said article. Consequently the AGM was inquorate as the 6th defendant was not at the relevant time a shareholder because of the invalid transfer of share. Therefore, everything that flows from that AGM is also invalid and that includes the non-re-election of the plaintiffs as directors. Again the defendants asked the court to invoke s. 355 and again I decline to do so and the reasons for doing so can be found in the following submission of learned counsel for the plaintiffs which I agree entirely, viz.:

> As for the invocation of section 355 of the Companies Act, it is respectfully submitted that for similar reasons submitted above, the application should not be entertained by the court. It is clear from the evidence that the 1 share was created by the 5th defendant for an improper purpose. It was being used to ultimately change the composition of the board of directors and the control and management of the company. The non-compliance of the various articles was not a mere inadvertence but calculated move to perpetrate an injustice on the plaintiffs who have equal shares in the family companies. The 5th and 6th defendants need not resort to such actions as there are available remedies under s. 150 of the Companies Act if they have a legitimate complaint that the plaintiffs are deliberately causing a lack of quorum by absenting themselves.

One other point was taken by the defendants and that is that the matter of the 4th defendant no longer calls for consideration for the issuance of an interlocutory injunction because the parties have agreed to certain positions as reflected in the draft order which the parties have signed. The relevant paragraph of this draft relating to the undertaking of the said defendants reads:

> (c) save and except with then leave of this Honourable Court and until the disposal of the action herein, that the 5th and 6th Defendants shall not in any way deal with the one (1) ordinary share in the 4th Defendant which was transferred by the 5th Defendant to the 6th Defendant or to exercise any voting rights in respect thereof provided that the 5th Defendant shall be at liberty to call for and convene the Annual General Meeting of the 4th Defendant;

The application for the injunction was thereafter adjourned to 20 March 2002 and the judge adjourned the hearing. But that only covers the position of the share and the transferee of the share and not with the other matters which I

have adverted to, like the matter of the validity of the AGM and the lack of a board meeting to approve the transfer.

The defendants have raised other matters as vitiating factors that should dissuade the court from granting the injunction. One such factor is the allegation that the plaintiffs had subverted statutory meetings. The case of *Re Al Sombrero* [1958] 1 Ch. D 900 was referred to but that case concerns with the refusal to call an AGM which is not the case here. Another factor urged was that the outcome of the meeting was inevitable, that is all the resolutions would have been passed in any event and the case of *Re Opera Photographic* [1989] BCLC 763 but that is only true if you have 51% of the shares as in that case but in the present case the plaintiffs hold 50% while the said defendants hold the 50%. Because the said defendants do not hold the majority share, the outcome of any meeting can hardly be said to be inevitable. The matter of the plaintiffs staying away from the meeting was also urged but they have their reasons to do so and even if it is for the wrong reason, it cannot justify the unlawful acts which the said defendants had resorted to. After all, the law envisage a situation of the lack of quorum arising and hence the enactment of s. 150 of the Companies Act which enables the court to call for a meeting on the application of any director or member even if there is not a sufficient quorum. I have also considered the allegation that the plaintiffs have come to court with unclean hands but I find the allegations to be made barely and for the purpose of throwing a smokescreen on the many unlawful acts of the said defendants which I have mentioned earlier. There are other procedural points taken by the defendants which do not merit even a mention as they are of no substance at all.

I have considered the matter taking the following criteria of *American Cyanamid v. Ethicon Ltd* [1975] AC 396 into account and these are:

(a) Is there a serious issue to be tried?

(b) Are damages an adequate remedy?

(c) Where does the "balance of convenience" lie?

(d) Are there any "special factors"

Having gone through the facts and law, I find that there is a serious issue to be tried, that damages is not an adequate remedy, the balance of convenience favours the granting of the injunction and there are no special factors vitiating the grant of an injunction.

In the premises I grant an order in terms of prayers 1 to 6 of the summons in chambers dated 21 January 2002 until the trial of this action. Costs in the cause. I fix 16 April 2003 at 9am to consider any application for directions that may be required arising out of the grant of the injunction herein.